Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-1684

In the Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

JOINT APPENDIX

REX E. LEE
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Appellants

RICHARD G. PETERSON
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
Counsel for Appellee

JURISDICTIONAL STATEMENT FILED APRIL 14, 1983
PROBABLE JURISDICTION NOTED JUNE 6, 1983

In the Supreme Court of the United States

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA

Civ. No. A1-82-10

LONE STEER, INC.

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR;
LOREN GILBERT, ASSISTANT REGIONAL ADMINISTRATOR
EMPLOYMENT STANDARDS ADMINISTRATION,
UNITED STATES DEPARTMENT OF LABOR;
AND AL GODES, COMPLIANCE OFFICER
WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

RELEVANT DOCKET ENTRIES

1982	
Feb. 1	SUMMONS (prepared by counsel) with attached VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT, w/attached Exhibit A, Filed.
	MOTION FOR TEMPORARY RESTRAINING ORDER, w/attached
	AFFIDAVIT OF PLAINTIFF'S ATTORNEY RICHARD G. PETERSON and EXHIBIT A (1-20-82 letter to Richard Peterson from Loren E. Gilbert), Filed.
	PLAINTIFF'S MEMORANDUM BRIEF IN SUPPORT OF TEMPORARY RESTRAINING ORDER, with attached EXHIBITS A-K, Filed.
	ORDER, Filed & Entered, that motion for TRO be denied.
	NOTICE OF ENTRY that atty. Peterson and Al Godes personally received copies of above Order.
	J.S. 5 card made.

Feb. 3	SUMMONS, Issued, (Original and 5 copies to Office of Peterson and Sasseville in Fargo, with Clerk's Order endorsed thereon, appointing Richard Peterson, as person appointed for service of process.)
Feb. 17	SHERIFF's RETURN, Ret'd, Filed, indicating service on AUSA Lynn Crooks, Fargo, on 2-11-82.
Feb. 19	AMENDED VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION PERMANENT INJUNCTION AND DECLARATORY JUDGMENT with Exhibit "A" & "B" with attached AFFIDAVIT OF SERVICE BY MAIL, Filed.
Feb. 22	(ORIGINAL) SUMMONS and AFFIDAVIT OF SERVICE BY MAIL, w/RECEIPTS FOR CERTIFIED MAIL enclosed, Filed. (Loren Gilbert, Al Godes, Raymond Donovan, U.S. Attorney General, U.S. Attorney-Fgo, U.S. Dept. of Labor-Legal Counsel)
Mar. 8	AFFIDAVIT OF SERVICE BY MAIL with CERTIFIED MAIL RECEIPTS, on service of Amended Verified Complaint for Preliminary Injunction, Permanent Injunction and Declaratory Judgment, Filed.
Apr. 12	PLAINTIFF's MOTION FOR LEAVE OF COURT TO AMEND COMPLAINT, Filed. (Proposed Order lodged with the Clerk's Office.)
	MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE OF COURT TO AMEND COMPLAINT, Filed.
	CERTIFICATE OF SERVICE, Filed (Documents 10-12 & Second Verified Complaint)
	(Second Verified Complaint for Preliminary Injunction, Permanent Injunction and Declaratory Judgment Lodged with the Clerk pending signing of Order by Court.)
	DEFENDANT's OBJECTION TO MOTION FOR LEAVE TO AMEND COMPLAINT, Filed.
	DEFENDANT's MOTION TO DISMISS, Filed.
	DEFENDANT's MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS, Filed.
	CERTIFICATE OF SERVICE BY MAIL, Filed. (Documents 13-16)
Apr. 14	ORDER, Filed and Entered that Plaintiff's Motion for leave to file a second amended complaint is granted.

NOTICE OF ENTRY to Counsel of Record with copy of Order attached.

SECOND VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION AND DECLARATORY JUDGMENT, with attached Exhibits, Filed.

Apr. 22 PLAINTIFF'S MEMORANDUM BRIEF IN OPPOSITION TO MOTION TO DISMISS with attached CERTIFICATE OF SERVICE, Filed.

Apr. 22 DEFENDANT'S MOTION TO DISMISS, with SUPPORTING STATEMENT and CERTIFICATE OF SERVICE, thereon, Filed.

Apr. 26 DEFENDANTS' REPLY MEMORANDUM with CERTIFICATE OF SERVICE endorsed thereon, Filed.

May 6 ORDER, Filed and Entered, that motion to dismiss is denied and pre-trial conf. to be held on May 28, 1982 at 9:00 a.m.

NOTICE OF ENTRY to Counsel of Record with copy of Order attached.

May 14 (DEFT'S) *ANSWER* TO SECOND VERIFIED COMPLAINT with attached CERTIFICATE OF SERVICE, Filed.

May 28 PLAINTIFF's PRE-TRIAL BRIEF, with attached CERTIFICATE OF SERVICE, Filed.

PRETRIAL BRIEF FOR THE UNITED STATES DEPARTMENT OF LABOR, with CERTIFICATE OF SERVICE thereon, Filed.

CLERK'S RECORD OF PRE-TRIAL CONFERENCE—Richard G. Peterson for Pltf., Henry C. Mahlman & Charles S. Miller for Defts. Discussion re: Motion & Order to Dismiss & Defts' request for reconsideration thereof. Discussion re: joining this case with A1-82-24. Court request written motion for reconsideration & written motion for summary judgment. Court directs discovery be completed by 7-8-82, and trial, if necessary will be held on 7-9-82. Recess.

ORDER AFTER PRETRIAL, Filed & Entered; cases A1-82-10 & A1-82-24 are consolidated ... counsel are agreed that it may be possible to resolve these cases on cross motions for summary judgment ... the discovery period in both cases is

extended to and including 7/8/82. If fact issues remain for resolution by the Court, the same shall be presented by trial of those issues on 7/9/82 @ 9:30 AM.

June 2 NOTICE OF ENTRY, with copy to counsel. (Copy of Order After Pre-Trial to Court Officials).

July 9 CLERK'S RECORD OF CHAMBERS CONFERENCE—Court Trial scheduled this date—Counsel advise Court that they have agreed to a stipulation of facts and will complete cross-briefing on Motions for Summary Judgment by 8-9-82, at which time Court will consider said motions. Recess.

Aug. 4 STIPULATION of Facts signed by Counsel of Record, Filed. (Conformed copies sent to counsel of record upon request by U.S. Attorney).

Aug. 9 PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, Filed.

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, Filed.

CERTIFICATE OF SERVICE BY MAIL, Filed.

MOTION BY RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., FOR SUMMARY JUDGMENT, AND MEMORANDUM OF LAW IN SUPPORT THEREOF, with CERTIFICATE OF SERVICE, thereon, Filed.

Oct. 28 ORDER, Filed & Entered; that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant; . . . the Court having considered the cross motions for summary judgment, . . . and having concluded that there are no material facts at issue, that Lone Steer, Inc., is entitled to a judgment as a matter of law, ORDERED that summary judgment in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, be entered by the Clerk. No costs to either party. JUDGMENT pursuant to foregoing Order, Filed & Entered; NOTICE OF ENTRY of foregoing Order & Judgment, with copy to counsel.

J.S. 6 card made.

"CLOSED"

Nov. 8 (Deft. Dept. of Labor) MOTION TO ALTER OR AMEND JUDGMENT with CERTIFICATE OF SERVICE BY MAIL, Filed.

Nov. 17 (PLTF) BRIEF IN OPPOSITION TO MOTION TO ALTER OR AMEND JUDGMENT, Filed; with attached CERTIFICATE OF SERVICE (2), Filed.

Nov. 24 ORDER, Filed and Entered, that motion to alter or amend this Crt's Order of October 28, 1982 be, and the same hereby is, in all things, DENIED. NOTICE OF ENTRY with copy attached to counsel of record.

Dec. 15 (DEFT'S) NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES with attached AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO SUPREME COURT OF THE US, Filed. (Conformed copy to AUSA Miller)

1983

Jan. 17 *(GOVT'S) NOTICE OF APPEAL* from Judgment of Oct 28, 1982 to USCA8, Filed. Copy of ADMISSION OF SERVICE FORM. (Form w/Notice of Appeal to counsel for Appellee & Court Reporter)

Copy of ORDER FOR APPELLATE TRANSCRIPT. (Copies to counsel of record & Crt Rep)

Copy of DOCKET ENTRIES as fwd to USCA8 & counsel.

TWO CERTIFIED COPIES OF NOTICE OF APPEAL, JUDGMENT of Oct. 28, 1982 & DOCKET ENTRIES fwd via cert. mail, RRR, to USCA8, St Louis, MO.

ADMISSION OF SERVICE FORM of Notice of Appeal by Court Reporter, Filed.

Jan. 19 ADMISSION OF SERVICE FORM of Notice of Appeal by Appellee, Filed.

Jan 31 (Appellants) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed.

CERTIFICATE OF SERVICE BY MAIL of the foregoing document, Filed.

Feb. 7 (Appellee's) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed, with attached CERTIFICATE OF SERVICE BY MAIL, Filed.

Feb. 17	Copy of INDEX of Designated Record forwarded to USCA8, via cert. mail, RRR.
Apr. 27	NOTICE OF FILING AN APPEAL before the U.S. Supreme Court, Filed.
June 9	Cert. Copy of ORDER of US Supreme Court noting probable jurisdiction, Filed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

CIV. NO. A1-82-24

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

v.

LONE STEER, INC.

RELEVANT DOCKET ENTRIES

1982

Mar. 3	PETITION TO COMPEL RESPONDENT TO ATTEND, TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE with attached Exhibits A-D, Filed.
	MEMORANDUM IN SUPPORT OF PETITION TO COMPEL RESPONDENT TO ATTEND, TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE with attached Exhibits, Filed.
	(Proposed Order to Show Cause lodged with the Clerk's Office)
	SUMMONS, Issued, (Original and 1 copy to U.S. Marshal for Service on Susie White, Registered Agent for Lone Steer, Inc.)
	J. S. 5 card made.
Mar. 11	U.S. MARSHAL'S SERVICE RECORD, Returned, Filed, indicating service on Susie White, with ORIGINAL SUMMONS attached.
Mar. 17	COPIES OF DOCUMENT NO. 1 sent to: Denver.
Mar. 25	RESPONDENTS RESPONSE TO PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION TO COMPEL RESPONDENT TO ATTEND, TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE with attached CERTIFICATE OF SERVICE, Filed.
May 28	(COPY OF) ORDER AFTER PRETRIAL, Filed & Entered; Cases A1-82-10 & A1-82-24 are consolidated . . . counsel are agreed that it may be possible to resolve these cases on cross motions for sum-

mary judgment ... the discovery period in both cases is extended to and including 7/8/82. If fact issues remain for resolution by the Court, the same shall be presented by trial of those issues on 7/9/82 @ 9:30 AM.

June 2 NOTICE OF ENTRY, with copy to counsel. (Copy of Order After Pretrial to Court Officials).

July 9 CLERK'S RECORD OF CHAMBERS CONFERENCE—Court Trial scheduled this date—Counsel advise Court that they have agreed to a stipulation of facts and will complete cross-briefing on Motions for Summary Judgment by 8-9-82, at which time Court will consider said Motions. Recess.

Aug. 4 STIPULATION of Facts with signatures of Counsel of Record, Filed.

Aug. 9 LONE STEER'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, Filed.

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS, with attached CERTIFICATE OF SERVICE BY MAIL, Filed.

MOTION BY RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, ET AL., FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF, with CERTIFICATE OF SERVICE, thereon, Filed.

Oct. 28 ORDER, Filed & Entered; that the Secretary of Labor may *not* proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act without first having obtained a valid warrant; ... the Court having considered the cross motions for summary judgment, ... and having concluded that there are no material facts at issue, that Lone Steer, Inc., is entitled to a judgment as a matter of law, ORDERED that summary judgment in favor of Lone Steer, Inc., and against Raymond J. Donovan, Secretary of Labor, United States Department of Labor, be entered by the Clerk. No costs to either party.

JUDGMENT pursuant to foregoing Order, Filed & Entered;

	NOTICE OF ENTRY of foregoing Order & Judgment, with copy to counsel.
	J.S. 6 card made.
	"CLOSED"
Nov. 8	(DEFT. DEPT OF LABOR) MOTION TO ALTER OR AMEND JUDGMENT, with CERTIFICATE OF SERVICE, Filed.
Nov. 17	(PLTF) BRIEF IN OPPOSITION TO MOTION TO ALTER OR AMEND JUDGMENT, Filed; with attached CERTIFICATE OF SERVICE (2), Filed.
Nov. 24	Copy of ORDER, Filed and Entered, that motion to alter or amend this Crt's order of October 28, 1982 be, and the same hereby is, in all things, DENIED. (Copy of) NOTICE OF ENTRY with copy attached to counsel of record.
Dec. 15	(DEFT'S) NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES with AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO SUPREME COURT OF THE US, Filed. (Conformed copy to AUSA Miller)
Jan. 17	*(PLTF'S) NOTICE OF APPEAL* from Judgment of Oct. 28, 1982 to USCA8, Filed.
	Copy of ADMISSION OF SERVICE FORM. (Form w/copy of Notice of Appeal to Deft. counsel & Court reporter)
	Copy of ORDER FOR APPELLATE TRANSCRIPT. (Copies to counsel of record & Crt Reporter)
	Copy of DOCKET ENTRIES as forwarded to USCA8 and counsel.
	TWO CERTIFIED COPIES OF NOTICE OF APPEAL, JUDGMENT of Oct 28, 1982 & DOCKET ENTRIES TO USCA8 via cert. mail, RRR.
Jan. 19	ADMISSION OF SERVICE FORM of Notice of Appeal by Appellee, Filed.
Jan. 31	(Appellants) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed. (Copy of) CERTIFICATE OF SERVICE BY MAIL, Filed.
Feb. 7	(Appellee's) DESIGNATION OF CLERK'S RECORD FOR APPEAL, Filed.
Feb. 17	Copy of INDEX of Designated Record forwarded to USCA8, via cert. mail, RRR.

Feb. 28 ORDER of USCA8 that appellant's motion for stay of further proceedings is Granted & the cause abated until 4-15-83, Filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No. A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
ET AL. DEFENDANTS.

CIVIL ACTION NO. A1-82-24
RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNTIED STATES DEPARTMENT OF LABOR,
PETITIONER,

v.

LONE STEER, INC., A CORPORATION, RESPONDENT.

STIPULATION

The parties hereto, by their undersigned counsel, stipulate and agree that the following agreed facts are the facts upon which the Court may make and enter findings of fact in these cases:

1. Pursuant to Section 11 of the Fair Labor Standards Act, [hereinafter the "Act"], compliance officers with the Wage-Hour Division of the U.S. Department of Labor [hereinafter the "Department"] enter establishments of employers and conduct investigations for compliance with the Act and related applicable statutes. In the case at bar, as in most, the compliance officer first arranges an appointment for that purpose.

2. The Department schedules investigations for several reasons. It may receive a complaint from a present or former employee or competitor. It may select an employer for an investigation because the employer is in an industry having generally consistent, industry-wide tendency to compensate employees in a particular manner, which the Department seeks to review. In any event, an investiga-

tion, once scheduled, is normally a comprehensive one with respect to compliance with the Act and related applicable statutes. The compliance officers instructions are to review compliance throughout that particular establishment, without regard to the basis upon which the investigation was scheduled and without limiting or circumscribing the scope of the investigation to that basis. For example, if a complaint is made to the Department by an employee for wage payments to him for one pay period, an investigation may be scheduled; if so, it would not be limited in scope to that basis and related matters. Also, for example, if an investigation is scheduled to review child labor practices, the investigation is not limited to that basis. However, in a few instances, the scope of the investigation may be limited, for example, to the child labor practices. If so, the compliance officer so informs the employer during the opening conference. The investigation sought to be conducted in the case at bar is a complete one, not a limited one. The Department does not disclose the basis for the investigation.

3. On January 6, 1982, Al Godes, a compliance officer with the Wage & Hour Division of the Department, whose office is in Bismarck, North Dakota, telephoned Lone Steer, Inc. [hereinafter "Lone Steer"], a restaurant-motel in Steele, ND, informing Susann White, its manager, that he would commence an investigation of Lone Steer the following morning at 9:00 a.m. Also, he told Ms. White to make available time, wage and payroll records for all employees for the last two years. Late that day, January 6, 1982, Ms. White called Mr. Godes back, stating that it was not convenient for Mr. Godes to conduct the investigation the following morning.

4. The next day, January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he had rescheduled the investigation of Lone Steer for January 14, 1982 at 9:00 a.m. The letter stated:

> The Wage and Hour Division is responsible for the administration and enforcement of a number of Federal laws involving labor standards. These include the Fair Labor Standards Act, the Public Contracts Act, the Service Contract Act, the Age Discrimination in Em-

ployment Act, and Title III, Consumer Credit Protection Act. The Division also has certain responsibilities under the Davis-Bacon Act and related statutes, including the Contract Work Hours and Safety Standards Act.

This is to advise you that I will call at your establishment on the date and at the time shown above [i.e., January 14, 1982 at 9:00 a.m.] to determine compliance with the Fair Labor Standards Act (this will also include the other laws, as listed above, if any of these apply). Every effort will be made to conduct this assignment expeditiously and with a minimum of inconvenience to you and your employees.

If you or your designated representative will not be available on the date and at the time indicated above, please let me know promptly so that we can work out some other arrangement.

5. On January 12, 1982, Lone Steer's attorney, Richard G. Peterson, called Mr. Godes regarding the investigation of Lone Steer. Mr. Peterson informed Mr. Godes that he might be able to meet with Mr. Godes at Lone Steer, but that he would get back to Mr. Godes to confirm.

6. That same day, January 12, 1982, Mr. Peterson sent Mr. Godes a letter informing him that:

I represent Lone Steer Cafe in Steele, North Dakota.

Before we consider your request to conduct an inspection, we request disclosure from you as to whether the inspection is prompted by specific complaint(s). If so, we request disclosure of the nature of the complaint(s).

If, on the other hand, you propose a general administrative inspection for compliance—not prompted by specific complaint—we request to know the scope of the investigation.

Until this matter is resolved, you do not have permission to conduct an investigation.

7. On January 14, 1982, Mr. Godes called Lone Steer, but could not reach Ms. White. Later that day, after Mr. Godes received Mr. Peterson's letter of January 12, 1982, Mr. Godes placed two more calls to Lone Steer, but could not reach Ms. White.

8. Mr. Godes forwarded Mr. Peterson's letter to the Regional Office of the Wage & Hour Division in Denver. On January 20, 1982, Loren E. Gilbert, the Assistant Regional Administrator for Wage & Hour, sent a letter to Mr. Peterson which stated:

> This is in response to your letter of January 12, 1982, to Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will not be given. See *Cudahy Packing Co.* v. *Fleming*, 122 F.2d 1005 (8th Cir. 1941).
>
> Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.
>
> I have instructed Mr. Godes to initiate this investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation.

Mr. Gilbert instructed Mr. Godes to attempt the investigation in the company of Gerald Hill, Assistant Area Director, Denver.

9. Mr. Peterson received Mr. Gilbert's letter on January 25, 1982. On January 28, 1982, Mr. Peterson called Mr. Gilbert to repeat that Mr. Godes did not have permission of Lone Steer to investigate. He also informed Mr. Gilbert that a warrant from an independent magistrate would be required under the U.S. Supreme Court ruling of *Marshall* v. *Barlow's, Inc.* Mr. Gilbert then instructed Mr. Godes to attempt the investigation and, in the event of the likely refusal of Lone Steer to permit such investigation, to serve

Lone Steer with an administrative *Subpoena Duces Tecum.*

10. On February 2, 1982, at approximately 10:30 a.m., Mr. Godes and Mr. Hill entered the Lone Steer establishment to attempt to conduct an investigation. They asked for Ms. White and were told she was not available but expected shortly. They were offered some coffee, and waited in the lobby area. After 20-30 minutes, when Ms. White had not appeared, Mr. Godes served an Administrative Subpoena Duces Tecum on employee Karen Arnold. The parties agree that Lone Steer was properly served with the subpoena.

11. The Administrative Subpoena is addressed to: "Any officer, agent or employee of Lone Steer, Inc., a corporation, ... having custody, personal knowledge, and information regarding the books, papers and documents described below." It further states:

> You are hereby required to appear before Al Godes of the Wage and Hour Division, United States Department of Labor, at Room 354, Federal Building, 3rd and Rosser in the City of Bismarck, North Dakota on the 9th day of February, 1982, at 11 o'clock a.m. of that day, to testify regarding the wages, hours, and other conditions and practices of employment maintained by Lone Steer, Inc.
>
> And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:
>
> A. Payroll or other records covering the three-year time period prior to the date of this subpoena containing the following information with respect to each and every employee of Lone Steer, Inc.:
>
> (1) Name in full, and if used, any identifying symbol or number of the employee;
>
> (2) Home address, including zip code;
>
> (3) Date of birth, if under 19;
>
> (4) Occupation in which employed;
>
> (5) Time of day and day of week on which the employee's workweek begins;
>
> (6) Regular hourly rate of pay or any other basis on which wages are paid;

(7) Hours worked each workday and total hours worked each workweek;

(8) Total daily or weekly straight-time earnings;

(9) Total overtime compensation for the workweek;

(10) Total additions to or deductions from wages paid each pay period;

(11) Total wages paid each pay period;

(12) Date of payment and the pay period covered by payment.

B. Records showing, for the three-year time period prior to this subpoena, (1) the dollar volume of sales made or business done; (2) the names and addresses of businesses from whom Lone Steer, Inc., has purchased goods or supplies.

The subpoena was issued in Washington, D.C. on January 28, 1982 by William Otter, Administrator of the Wage and Hour Division.

12. On February 8, 1982, Mr. Peterson called Henry Mahlman, Counsel for the U.S. Department of Labor in Denver, to advise that Lone Steer would not comply, a position confirmed in his letter to Mr. Mahlman of February 10, 1982. The letter states:

> "This letter i[s] pursuant to our telephone conference on February 8, 1982 when I informed you that we view the Administrative Subpoena, attached hereto, issued by the Wage-Hour Administrator, U.S. Department of Labor, as invalid under the Fourth Amendment and the clear holding of Secretary of Labor *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 Sup. Ct. 1816, 56 L.Ed.2d 305 (1978). Accordingly, I further informed you that Lone Steer, Inc. would respectfully decline to respond to it. I also informed you that we are ready to defend against any motion or action the Labor Department deems appropriate to resolve the issue.
>
> The U.S. Supreme Court in *Barlow's* stressed the "presumptive" invalidity of warrantless inspections under regulatory statutes. We believe there is little doubt that a broad discovery device, a Subpoena, issued by the Department itself, cannot be utilized when entry to an employer's premises for purposes of a search and seizure is denied. As you recall, in *Barlow's*, your Department obtained a Court Order,

under "compulsory-process" provisions of OSHA, which was held invalid under the Fourth Amendment.

The issue is so important that we request that this matter be referred as expeditiously as possible to a forum for resolution. Accordingly, I am taking the extraordinary step of sending a copy of this letter to the U.S. District Court."

To date, there has been no response or appearance pursuant to the Subpoena.

/s/ _____
Richard G. Peterson
Peterson & Sasseville
Attorney for Lone Steer, Inc.
Dated: July 15, 1982

/s/ _____
HENRY C. MAHLMAN
Office of the Solicitor
U.S. Department of Labor
Dated: July 12, 1982

/s/ _____
CHARLES S. MILLER, JR.
Assistant United States Attorney
Dated: August 4, 1982
Attorneys for Raymond J. Donovan, Secretary of Labor, United States Department of Labor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil Action No. A1-82-10

LONE STEER, INC., PLAINTIFF,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR; LOREN GILBERT, ASSISTANT REGIONAL ADMINISTRATOR, EMPLOYMENT STANDARDS ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR; AND AL GODES, COMPLIANCE OFFICER WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS.

SECOND VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

COMES NOW the Plaintiff, Lone Steer, Inc., and for its cause of action against the Defendants, Raymond Donovan, Secretary of Labor et al., states as follows:

I.

This action arises under Section 11 of the Fair Labor Standards Act (29 USC § 211) and the Fourth Amendment of the United States Constitution which presents a question of Federal Law conferring jurisdiction upon this Court.

II.

Plaintiff is a corporation duly organized under and by virtue of the Laws of the State of North Dakota and is qualified to do business and is doing business in the State of North Dakota and is subject to the Fair Labor Standards Act (hereinafter, the "Act").

III.

Defendant Donovan is United States Secretary of Labor and is charged with the enforcement of the Fair Labor Standards Act, which duties he may carry out through authorized agents. Defendant Gilbert is Assistant Regional

Administrator for Wage-Hour/ESA, United States Department of Labor; and Defendant Godes is a Compliance Officer with Wage-Hour Division, United States Department of Labor.

IV.

Section 11(a) of the Act is the inspection provision of the regulatory statute and specifically authorizes the Defendant Secretary of Labor or his designated representatives to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

V.

Pursuant to Section 11(a) of the Act, Defendant Godes, a designated representative of Defendant Secretary Donovan, has engaged in a pattern and practice of conducting Act compliance inspections of non-public premises and records of employers, without permission or consent of said employers, and without a warrant, by asserting his apparent authority. Also, during said inspections, Defendant Godes interrogated employees of said employers without employer or employee consent by asserting his apparent authority. The inspection methods of Defendant Godes created an atmosphere of provocation, tension, harrassment, disruption, ill will for employer representatives and employees alike.

VI.

On December 11, 1981, a former employee of the Plaintiff, Duane Irish, filed a Complaint with the North Dakota Department of Labor regarding a claim for one day's wages. The Complaint was subsequently refiled to the U.S. Department of Labor, Wage and Hour Division, Bismarck, North Dakota for investigation.

VII.

That Plaintiff has paid said former employee, Duane Irish, in full for the claimed wages.

VIII.

Pursuant to Section 11(a) of the Act, on or about the 5th day of January, 1982, Defendant Secretary of Labor, through his designated representative, Defendant Godes, contacted Plaintiff's manager to make arrangements to enter Plaintiff's place of business in Steele, North Dakota in order to institute an investigation to determine the Plaintiff's compliance with the Act.

IX.

Neither Plaintiff nor its representatives have questioned Plaintiff's status as subject to the Fair Labor Standards Act.

X.

On January 12, 1982 the Plaintiff through its attorney, Richard G. Peterson, attempted to obtain information regarding whether the investigation was a "general administrative inspection for compliance" or "prompted by specific complaint(s)" and as to the scope of investigation. Plaintiff's attorney stated that permission was not granted to inspect and would not be considered again until the purpose and scope of the investigation was disclosed.

XI.

Despite Plaintiff's denial of permission to conduct an inspection, Defendants unilaterally scheduled an inspection in Plaintiff's business offices in Steele, North Dakota on February 2, 1982. The letter dated January 20, 1982 (Exhibit A) states that Defendant Godes was instructed to conduct the inspection on Tuesday, February 2, 1982 at 10:30 A.M. at the Plaintiff's offices in Steele, North Dakota.

XII.

On February 2, 1982 Defendant Godes and Gerald H. Hill, appeared at the business premises of Plaintiff and were denied permission again to conduct an inspection.

They left at said premises an administrative Subpoena issued by the U.S. Labor Department itself, the Wage and Hour Administrator (attached hereto as Exhibit B), requiring the production of books, papers and documents before Defendant Godes in furthance [*sic*] of its investigation to determine Plaintiff's compliance with the Act.

XIII.

Use of the administrative Subpoena by Defendants, in furtherance of its attempted inspection at Plaintiff's premises, pursuant to Sections 11 and 9 of the Act, constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution. Also, said administrative Subpoena purports to authorize inspection of Plaintiff's records without a warrant or its equivalent. Further, said inspection and administrative Subpoena was prompted by a pending charge or complaint, which requires a warrant or its equivalent with a showing of probable cause. In any event, said administrative Subpoena is overly broad in scope and unreasonable.

XIV.

The Defendants' investigation pursuant to Section 11 and 9 of the Fair Labor Standards Act (29 USC § 211) constitutes and [*sic*] unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution.

XV.

As direct result of the investigation in violation of the Fourth Amendment of the United States Constitution, Plaintiff will suffer permanent and irreparable harm and injury.

XVI.

As a direct result of the investigation in violation of the Fourth Amendment of the United States Constitution, Plaintiff has no adequate remedy in a civil action at law.

XVII.

If the unconstitutional search and seizure is allowed to take place the Plaintiff will suffer far greater harm than the

Defendant would suffer from an injunction preventing such a search and seizure.

XVIII.

There exists an actual, justiciable case and controversy between the parties adversely and substantially interested in the matters stated in this Complaint.

WHEREFORE, the Plaintiff prays for Judgment as follows:

1. That a Preliminary Injunction be granted, enjoining Defendants from entering the Plaintiff's premises or seizing any of Plaintiff's property with an administrative Subpoena, without obtaining a warrant or its equivalent from an independent magistrate.

2. That a Permanent Injunction be granted enjoining the Defendants from entering Plaintiff's premises or seizing any of the Plaintiff's property with an administrative Subpoena, without obtaining a warrant or its equivalent from an independent magistrate.

3. That a Declaratory Judgment be granted declaring that the Fair Labor Standards Act is unconstitutional insofar as it purports to authorize a warrantless inspection of records by way of administrative Subpoena after entry to inspect has been denied.

4. That Plaintiff be granted its costs, reimbursements and legal fees and other relief as the Court may deem just and equitable.

Dated this ____ day of ____ 1982.

PETERSON & SASSEVILLE

BY: _____

RICHARD G. PETERSON
Attorney at Law
Suite 400-WDAY Tower
808 Third Avenue South
Fargo, North Dakota 58103
Telephone: (701) 280-2800
Attorneys For Plaintiff

EXHIBIT A

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
1442 Federal Office Building
1961 Stout Street
Denver, Colorado 80294

January 20, 1982

Mr. Richard G. Peterson
Peterson & Sasseville
Attorneys at Law
Suite 400, WDAY Tower
808 3rd Ave. S.
Fargo, ND 58103

Re: Lone Steer, Inc.
SOL No. 5878

Dear Mr. Peterson:

This is in response to your letter of January 12, 1982, to Al Godes, in which you request disclosure whether the investigation is a "general administrative inspection for compliance" or "prompted by specific complaint(s)." Under section 11 of the Act (29 U.S.C. 211), the Secretary may institute an investigation whether or not a complaint has been filed and, thus, the motive for the investigation will not be given. See *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (8th Cir. 1941).

Generally the scope of an investigation in any case consists of reviewing records, making transcriptions of records, and interviewing employees. Other facts and matters may be investigated when appropriate to determine the firm's compliance with the Fair Labor Standards Act.

I have instructed Mr. Godes to initiate this investigation on Tuesday, February 2, 1982, at 10:30 a.m. at Lone Steer's offices in Steele, North Dakota. If the firm intends to prohibit him from making this investigation at that time, please let me know so that I can request an administrative subpoena in order to conduct the investigation.

Sincerely,

/s/ _____

LOREN E. GILBERT
Assistant Regional Administrator
for Wage-Hour/ESA

EXHIBIT B

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
SUBPOENA DUCES TECUM

To any officer, agent, or employee of LONE STEER, INC., a corporation, Steele, North Dakota 58482, having custody, personal knowledge, and information regarding the books, papers, and documents described below.

You are hereby required to appear before AL GODES of the WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, at Room 354, Federal Building 3rd and Rosser in the City of Bismarck, North Dakota on the 9th day of February, 1982, at 11 o'clock a.m. of that day, to testify regarding the wages, hours, and other conditions and practices of employment maintained by Lone Steer, Inc.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

A. Payroll or other records covering the three-year time period prior to the date of this subpoena containing the following information with respect to each and every employee of Lone Steer, Inc.:

(1) Name in full, and if used, any identifying symbol or number of the employee;

(2) Home address, including zip code;

(3) Date of birth, if under 19;

(4) Occupation in which employed:

(5) Time of day and day of week on which the employee's workweek begins;

(6) Regular hourly rate of pay or any other basis on which wages are paid;

(7) Hours worked each workday and total hours worked each workweek;

(8) Total daily or weekly straight-time earnings;

(9) Total overtime compensation for the workweek;

(10) Total additions to or deductions from wages paid each pay period;

(11) Total wages paid each pay period;

(12) Date of payment and the pay period covered by payment.

B. Records showing, for the three-year time period prior to this subpoena, (1) the dollar volume of sales made or business done; (2) the names and addresses of businesses from whom Lone Steer, Inc., has purchased goods or supplies.

FAIL NOT AT YOUR PERIL

IN TESTIMONY WHEREOF *I have hereunto affixed my signature and the seal of the* UNITED STATES DEPARTMENT OF LABOR AT WASHINGTON, D.C. this 28 day of January, 1982.

/s/ _____

WILLIAM M. OTTER
ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

Supreme Court of the United States

No. 82-1684

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS,

v.

LONE STEER, INC.

APPEAL from the United States District Court for the District of North Dakota.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

JUNE 6, 1983

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